COURT OF APPEALS
DECISION
DATED AND FILED

December 10, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-1877 **Cir. Ct. No. 80PA001109**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN RE THE PATERNITY OF JOHN R. B.:

BARBARA B.,

PETITIONER-RESPONDENT,

V.

DORIAN H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: BARBARA A. KLUKA, Judge. *Affirmed*.

¶1 NETTESHEIM, J.[1] Dorian H. appeals from a trial court order requiring him to pay child support arrearages in the principal sum of $24,690 and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(h) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

interest of $42,612.90. He raises two constitutional arguments: (1) the trial court retroactively applied WIS. STAT. § 767.32(1r) against him in violation of the due process protections of both the federal and state constitutions, and (2) such application deprived him of a remedy for a wrong in violation of the Wisconsin Constitution. Rejecting these arguments, the trial court determined pursuant to ***Monicken v. Monicken***, 226 Wis. 2d 119, 593 N.W.2d 509 (Ct. App. 1999), that Dorian was not entitled to assert equitable estoppel against the payee, Barbara B., and that he was not entitled to credit for any sums paid to Barbara outside of the terms of the judgment for child support issued by the court in 1982. We affirm the trial court order.

BACKGROUND

¶2 On April 25, 1982, Dorian and Barbara entered into a stipulation that formed the basis for a paternity judgment. As a result of the stipulation, Dorian was adjudged the father of John R.B., born November 8, 1979. Dorian agreed to pay $30 per week to the clerk of courts as child support for John commencing May 7, 1982.

¶3 Nearly nineteen years later, on April 9, 2001, Barbara filed an Order to Show Cause alleging that Dorian violated the child support and arrears portions of the paternity judgment. Barbara's affidavit in support of her Order to Show Cause states, "According to the Child Support Agency, I am owed over $50,000 in arrears." On October 9, 2001, the family court commissioner ordered the child support agency to determine the amount of support owed by Dorian to Barbara. The child support agency submitted a statement to the court on November 30, 2001, indicating that Dorian owed Barbara $24,690 in child support arrearages and $42,612.90 in interest.

¶4 The family court commissioner then held a hearing on December 21, 2001, at which both Barbara and Dorian testified. On January 21, 2002, the commissioner issued a written order, finding:

> [T]here was an agreement made between the parties that the mother would not pursue child support in return for the father not having visitation with the child…. [A]lthough the court finds that this agreement would be against public policy, the court finds that [Dorian] has relied upon those promises by [Barbara], and thus, [Barbara] is collaterally estopped from pursuing the child support obligation at this time.

The commissioner additionally found that although Dorian had not made any child support payments since 1983, he had continued to pay John's private school tuition. Finally, the commissioner stated his belief that Barbara had waited until John was twenty-two years old to seek child support because she was concerned that an earlier request could have resulted in Dorian becoming involved in John's life and therefore equity demanded that Dorian not be held to the child support arrearages and interest.

¶5 Barbara requested and received a de novo review of the commissioner's decision before the trial court. At the hearing, Barbara noted the parties' disagreement as to the existence of an oral agreement regarding child support but contended that it was irrelevant to the application of WIS. STAT. § 767.32(1r) as set forth in ***Monicken***. The trial court agreed with Barbara and entered a written order overturning the commissioner's decision. The order stated, "[T]he doctrine of equitable estoppel, which was the basis for the court commissioner's decision to grant credit to [Dorian] for arrearages and interest for child support accumulated is not appropriate under existing Wisconsin law, particularly § 767.32(1r) and [***Monicken***]."

¶6 Dorian appeals, renewing his constitutional challenges.

DISCUSSION

¶7 As a general rule, "[s]tatutes carry a heavy presumption of constitutionality and the challenger has the burden of proving unconstitutionality beyond a reasonable doubt." ***Employers Health Ins. Co. v. Tesmer***, 161 Wis. 2d 733, 737, 469 N.W.2d 203 (Ct. App. 1991).

¶8 The revision of a child support judgment or order is governed by WIS. STAT. § 767.32. Section 767.32(1r) provides that in an action to revise a judgment or order with respect to child support, "the court may grant credit to the payer against support due prior to the date on which the petition, motion or order to show cause is served for payments made by the payer" only in very limited circumstances. Those circumstances include those in which the payer can show by documentary evidence that the payments were made directly to the payee or can prove by clear and convincing evidence, with evidence of a written agreement, that the payee expressly agreed to accept the payments in lieu of child or family support. Sec. 767.32(1r)(b), (c).[2]

[2] The other exceptions delineated under WIS. STAT. § 767.32(1r) are as follows:

> (d) The payer proves by documentary evidence that, for a period during which unpaid support accrued, the child received benefits under 42 USC § 402 (d) based on the payer's entitlement to federal disability insurance benefits ….
>
> (e) The payer proves by a preponderance of the evidence that the child lived with the payer, with the agreement of the payee, for more than 60 days beyond a court-ordered period of physical placement….

(continued)

¶9 Prior to the creation of WIS. STAT. § 767.32(1r) by 1993 Wis. Act 481, § 119, a circuit court had discretion to grant equitable credit for direct expenditures made other than as prescribed in the judgment if the judgment had been entered before August 1987. ***Monicken***, 226 Wis. 2d at 128. At the time of its inception, § 767.32(1r) did not provide for any circumstances under which the court could credit a payer for direct payments made in a manner other than prescribed in the judgment. ***Monicken***, 226 Wis. 2d at 129. In 1997 Wis. Act 273, the legislature amended and renumbered § 767.32(1r) to include limited circumstances under which credit might be given by the court. ***Monicken***, 226 Wis. 2d at 129.

¶10 The current WIS. STAT. § 767.32(1r) applies retroactively "to arrearages existing and child or family support payments past due on the effective date of this subsection [June 25, 1998], regardless of when the judgment or order under which the arrearages accrued or the child or family support is owed was entered." ***Monicken***, 226 Wis. 2d at 132 (citing 1997 Wis. Act 273, § 10). Equitable estoppel does not apply to § 767.32(1r) and credit against child support may only be permitted as the legislature has determined under § 767.32(1r). ***Monicken***, 226 Wis. 2d at 132-33.

¶11 Dorian contends that the retroactive application of WIS. STAT. § 767.32(1r) is unconstitutional. Specifically, he argues that the changes to

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> (f) The payer proves by a preponderance of the evidence that the payer and payee resumed living together with the child and that, during the period for which a credit is sought, the payer directly supported the family by paying amounts at least equal to the amount of unpaid court-ordered support that accrued during that period.

§ 767.32(1) over the years have created confusion for parties who have attempted to modify or revise child support. He concedes, as he must, that Barbara's action was filed in April 2001, long after his ability to use equitable estoppel came to an end in 1993 when the legislature amended § 767.32(1m) to add language providing that the courts could not revise "an amount of arrearages in child support … that has accrued, prior to the date that notice of the action is given to the respondent." 1993 Wis. Act 481, § 118.[3] However, Dorian contends that the change in the law came after he had relied upon Barbara's agreement that he would pay private school tuition for John until John's graduation in lieu of paying $30 per week in child support.

¶12 A constitutional challenge to the retroactive application of a statute presents a question of law that this court determines independent of the circuit court, but benefiting from its analysis. ***Schultz v. Natwick***, 2002 WI 125, ¶12, 257 Wis. 2d 19, 653 N.W.2d 266.

¶13 In ***Martin v. Richards***, 192 Wis. 2d 156, 531 N.W.2d 70 (1995), the supreme court created a two-prong balancing test to assess the constitutionality of the retroactive application of a statute. Under the first prong, the court considers the private interests overturned by the retroactive legislation in question. ***Schultz***, 257 Wis. 2d 19, ¶23. Under the second prong, the court examines the public interest served by the retroactive application of the statute to determine whether the public interest outweighs the private interest it overturns. ***Id***., ¶28.

[3] The legislature later amended WIS. STAT. § 767.32(1) by adding new provisions to § 767.32(1r) which permitted the court to allow revisions of child support orders for extrajudicial payments in very limited circumstances.

¶14 In ***Douglas County Child Support Enforcement Unit v. Fisher***, 200 Wis. 2d 807, 815-16, 547 N.W.2d 801 (Ct. App. 1996), this court recognized the public policy underpinning WIS. STAT. § 767.32(1m) and (1r) (1995-96):

> [Precluding recognition of payments made outside of the judgment] is a public policy decision made by the legislature, apparently on the belief that the public interest in addressing the problem of nonpayment of child support is best served by limiting payments to those made in accordance with the divorce judgment. This policy fixes arrearages with certainty and facilitates the determination as to who owes arrearages and what amount. Because creation of public policy expressed by clear and unambiguous legislation is the exclusive prerogative of the legislative branch of government, the courts are powerless to do anything other than apply the policy as determined by the legislature.

Since our statement in ***Douglas County***, the legislature amended § 767.32(1r) to recognize extrajudicial child support payments in only very limited circumstances. When a payer claims credit for direct payments to the payee, the legislature has required documentary evidence of such direct payments and proof that such payments were intended as support payments and not for other purposes. Sec. 767.32(1r)(b). When a payer claims that other payments were made, the legislature has required evidence of a written agreement between the parties by which the payee expressly agrees to accept the payments in lieu of the payments called for in the judgment or order. Sec. 767.32(1r)(c). Here, Dorian makes no claim of direct payments under para. (1r)(b), and he has provided no evidence of a written agreement under para. (1r)(c).

¶15 These statutory amendments acknowledge the reality that parents will sometimes make private arrangements regarding the payment of child support. At the same time, by imposing certain evidentiary requirements regarding such private payments, the amendments promote the public interest in

assuring that the private payments are actually the functional equivalent of the child support obligation. Thus, WIS. STAT. § 767.32(1r)(b) requires evidence of direct payments and proof that such payments were intended for support. Similarly, § 767.32(1r)(c) requires evidence of a written agreement when other payments are claimed in lieu of support payments. In doing so, § 767.32(1r) provides for the orderly administration and supervision of family court cases.

¶16 We conclude that WIS. STAT. § 767.32(1r) properly balances the public interest in requiring parents to provide for the financial support of their children and the need to monitor the fulfillment of that obligation against the ability of the parties to make alternate or "off the record" agreements. Further, compliance with § 767.32(1r) is within the control of the payer. A child support order defines the obligations of the parties and the courts provide them with the forum to request modification, enforcement or relief from those orders. We reject Dorian's constitutional challenge to the retroactive application of § 767.32(1r).

¶17 Dorian next contends that WIS. STAT. § 767.32(1r) is unconstitutional because it violates article I, section 9 of the Wisconsin Constitution that provides that there must be a remedy for every wrong. Wisconsin courts have interpreted this provision of the constitution in the following manner: "When an adequate remedy or forum does not exist to resolve disputes or provide due process, the courts, under the Wisconsin Constitution, can fashion an adequate remedy." ***Collins v. Eli Lilly Co.***, 116 Wis. 2d 166, 182, 342 N.W.2d 37 (1984).

¶18 Dorian's constitutional challenge is a nonstarter because the legislature has provided both a procedure and a forum which accommodate his concerns. The legislature has created the family courts as the forum in which a

child support obligation is initially set, *see* WIS. STAT. § 767.25, and the forum in which the parties may obtain modification of the obligation, *see* § 767.25(1m) and WIS. STAT. § 767.32(1). With such procedures and forums in place, Dorian will not be heard to constitutionally complain that he did not have a remedy for his perceived wrong.[4]

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[4] We note that Dorian makes an equity argument that he should not be responsible for interest accrued on a child support obligation that he believed to be terminated. Dorian did not raise this argument before the trial court and, therefore, we do not address it. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (appellate court does not usually consider matters raised for the first time on appeal).